91-1374

Supreme Court, U.S.
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No. 92 —

In The
Supreme Court of the United States

October Term, 1992

WILLIAM QUATTROCCHI, ET AL,
Individually and in his former capacity
as Associate Director of the High Security facility
at the Rhode Island Department of Corrections;
DAVID THORNTON, individually and in his
former capacity as Correctional Officer Lieutenant
at the High Security facility
of the Rhode Island Department of Corrections;
LINDA IACAMPO, individually and in her
capacity as a nurse
at the Rhode Island Department of Corrections;
JOHN J. MORAN, individually and in his
former capacity as the Director of the
Rhode Island Department of Corrections,
Petitioners,

v.

DAWN M. COCHRANE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

I. Can an adult prison visitor confronted with the choice of submitting to a strip search or foregoing visit, provide a legally-cognizable consent to said search, or is the very presenting of this choice to visitor constitutionally intolerable in every circumstance under the Fourth Amendment to the United States Constitution?

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FOR THE FIRST CIRCUIT

The petitioners, William Quattrocchi, David Thornton, Linda Iacampo, and John J. Moran pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals For The First Circuit rendered in these proceedings on November 15, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals For The First Circuit, as yet unreported, appears at Appendix A hereof, pp. A-1 to A-9. The opinion of the United States District Court for the District of Rhode Island, May 9, 1991, appears at Appendix B hereof, pp. B-1 to B-9.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 15, 1991. This petition is filed within 90 days of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

U. S. SUPREME COURT DECISIONS INVOLVED

1. Katz v United States, 389 US 347, 19 L. Ed. 2d.576, 88 S.Ct.507 (1967): Pertinent text:

> 389 US 347 at 585:
>
> "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions . . .".

2. United States v. Matlock, 415 US 164, 39 L.Ed. 2d 242, 246, 94 S. Ct. 988 (1974): Pertinent text:

> 39 L. Ed. 2d, page 246:
>
> "In Schneckloth v Bustamonte, 412 US 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the Court reaffirmed the principle that the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is

valid under the Fourth Amendment."

3. Washington v Chrisman, 455 US 1, 70 L. Ed. 2d. 778, 787, 102 S. Ct. 812 (1982): Pertinent text:

70 L. Ed. 2d, page 787:
"The seizure of the drugs pursuant to respondent's valid consent did not violate the Fourth Amendment.

4. Zap v United States, 328 US 624, 90 L. Ed. 1477, 66 S.Ct. 1277 (1946): Pertinent text:

328 US, page 628:
"As we have pointed out in Davis vs. United States, Ante, p. 582, [328 US 582, 66 S. Ct. 1256, 90 L. Ed. 2d., 1453], the law of searches and seizures as revealed in the decisions of this court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."

328 US, page 630:
"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' (citations omitted). It is equally well settled that one of the specifically-established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."

5. Schneckloth v Bustamonte, 412 US 218,93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973): Pertinent text:

36 L. Ed. 2d., pages 862-863:
"The question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the

totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.

36 L. Ed. 2d., page 863:
"The Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force"

328 US, page 630:
"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' (citations omitted). It is equally well settled that one of the specifically-established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."

36 L. Ed. 2d., page 875:
"Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

6. Bell v Wolfish, 441 US 520, 99 S. Ct. 1861, 60 L. Ed. 2d. 447 (1979): Pertinent text:

441 US 520, page 547-48:
"Prison authorities should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."

7. Inwood Laboratories, Inc. v Ives Laboratories, Inc., 456 US 844, 72 L. Ed. 2d. 606, 102 S. Ct. 2182 (1982): Pertinent text:

72 L. Ed. 2d, page 616:
"In reviewing the factual findings of the District Court, the

> Court of Appeals was bound by the 'clearly erroneous' standard of rule 52(a) Federal Rules of Civil Procedure.
>
> Pullman-Standard v Swint, ante, p. 273, 72 L.Ed. 2d. 66, 102 S. Ct. 1781 [456 US 273, 72 L. Ed. 2d 66, 102 S. Ct. 1781]. That rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. Zenith Radio Corp. v Hazeltine Research, Inc., 395 US 100, 123, 23 L.Ed.2d 129, 89 S.Ct.1562(1969). Because of the deference due the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been committed,' United States v United States Gypsum Co., 333 US 364, 395,92 L.Ed.746, 68 S.Ct. 525 (1948), it must accept the trial court's findings."

8. Davis v United States, 328 US 582, 90 L.Ed. 1453, 66 S. Ct. 1256: Pertinent text:

> 328 US, page 630:
> "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' (citations omitted). It is equally well settled that one of the specifically-established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. "

STATEMENT OF CASE

Plaintiff-respondent (hereinafter referred to as "respondent"), Dawn M. Cochrane, in 1990, commenced an action for injunctive relief and money damages in the United States District Court for the District of Rhode Island alleging a violation of her rights secured under the first, fourth, fourteenth amendments to the United States Constitution, pursuant to Title 42 of the U.S.C. Section 1983, and in addition asserted Rhode Island state law claims. A decision adverse to respondent was rendered by the United States District Court for the District of Rhode Island on May 9, 1991. (District Judge Lagueux's Decision pages 1-5, Appendix B) At the close of respondent's case before a jury, the district court granted petitioners' motion for directed verdict.

(District Judge Lagueux's Decision page 4, Appendix B) The district court found that the petitioners, various prison officials and employees did not violate respondent's first, fourth and fourteenth amendment constitutional rights nor her statutory rights, as a result of requiring respondent to submit to a strip search as a condition precedent to her visiting her inmate father. (District Judge Lagueux's Decision pages 1-5 Appendix B).

The District Court found that respondent, an adult, intelligently knew what a strip search entailed, that respondent voluntarily consented to the search, that respondent was not coerced in any way by the petitioners, and that the search conducted by the petitioners was reasonable in "every respect". (District Judge Lagueux's Decision page 4 Appendix B). The district court also found that respondent's first amendment right to association had not been violated by petitioners, on the basis that respondent did not possess a right to visit an inmate at the Rhode Island state prison. (District Judge Lagueux's Decision, page 4, Appendix B).

Respondent appealed to the United States Court of Appeals for the First Circuit contending that the decision by the district court was not in compliance with the decision rendered by the First Circuit Court of Appeals in Blackburn v. Snow, 771 F.2d 561 (1st. Cir. 1985).

On November 15, 1991, the First Circuit Court of Appeals issued a written decision finding that the district court decision was contrary to law espoused by the First Circuit Court in Blackburn, supra., vacated the district court decision and remanded for a new trial. (Appendix A).

REASONS FOR GRANTING THE WRIT

The United States Circuit Court of Appeals For the First Circuit has decided a federal question in a way in conflict with applicable decisions of this Supreme Court. (United States Supreme Court Rules, Rule 17.1(c)).

Question I:

I. Can an adult prison visitor confronted with the choice of submitting to a strip search or foregoing visit, provide a legally-cognizable consent to said search, or is the very presenting of this choice to visitor constitutionally intolerable in every circumstance under the fourth amendment to the United States Constitution?

In the instant case, the district court, based on uncontroverted evidence, found that respondent, an adult, upon entering the Rhode Island state prison for the purpose of visiting her inmate father, knowingly and intelligently

consented to submit to a strip search in order that she gain access to the prison; that she consented orally and by signing a written statement; that she knew and understood what a strip search entailed, in that all of her clothes would beremoved and her body viewed by female prison personnel; that the scope of the strip search upon respondent was reasonable in every respect, in that it was performed in a private ladies' rest room by two female correctional employees, one of them being a nurse; and that the only touching by the petitioners of respondent during said search was to comb through the respondent's hair to check for contraband. The district court also found by uncontroverted evidence that respondent had been a frequent visitor of the prison since she was very young, and that on the day of the search knew she could have at any time left the prison facility and was not coerced in any way.

The Circuit Court in rendering its decision in the instant case relied upon its opinion in Blackburn, supra., wherein at trial, the district court found that the only reason plaintiff-appellee was subjected to several strip searches, was not that defendants-appellants possessed any individualized suspicion of her, however, was simply executing prison policy which mandated that all visitors be strip searched. In Blackburn, supra., the plaintiff-appellee challenged this blanket strip search policy. The district court granted a temporary restraining order against the policy, and subsequently, the defendant-appellants agreed permanently to abandon said practice. Blackburn, supra., at 561.

The decision in Blackburn, supra., is not controlling over the instant case for the following reasons established by uncontroverted evidence:

a. In the instant case, the petitioner, Rhode Island Department of Corrections maintained the policy that strip searches may only be conducted upon the existence of reasonable suspicion that a prospective visitor possesses contraband, unlike the challenged mandatory visitor strip policy in Blackburn, supra.

b. During trial, petitioner Quattrocchi, who ordered the strip search of respondent in the instant case, did so in reliance on a tip provided by an inmate informer who had proven reliable in the past, who stated that respondent would, on her next visit, be possessing illegal drugs with the intent to distribute to her inmate drug-addicted father. No suspicion existed in Blackburn. Id at 560-561.

c. Respondent, when searched by petitioners was visiting her inmate father, who testified at trial that he was an habitual

drug user, and had in the past overdosed while incarcerated.

Despite these findings of the district court in this case, the First Circuit in its decision of November 15, 1991, specifically found, citing Blackburn, supra., with approval,

> "as a matter of law that a prison visitor confronted with the choice between submitting to a strip search or foregoing a visit cannot provide a 'legally- cognizable consent' ". (Circuit Court Opinion Appendix A-8).

Further citing Blackburn, supra., with approval, the First Circuit Court held:

> ". . .for it is the very choice to which she was put that is constitutionally intolerable. . .". (Id. Circuit Court Opinion Appendix A-6).

The First Circuit then held in said opinion:

> "given that Appellant in the instant case was confronted with a similar, and no less 'constitutionally intolerable', choice between being denied prison visitation access indefinitely or waiving her constitutional right to be free from unreasonable search, Blackburn requires the conclusion that appellant gave no 'legally cognizable consent.' " (Id. First Circuit Opinion Appendix A-6) (emphasis in opinion).

The Circuit Court then sustained respondent's appeal, vacated the judgment of the district court, and remanded the case for a new trial. Cochrane v. Quattrocchi, Et Al, slip op. 91-1493 (Appendix A-6).

ARGUMENT

This ruling by the United States Court of Appeals For the First Circuit does severe violence to the teachings of this Honorable Supreme Court and the United States Constitution.

This Honorable Court long ago, observed that all "searches conducted outside the judicial process, without prior approval by judge or magistrate, are

per se unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions." Katz v United States, 389 US 347 at 585 , 19 L.Ed.2d 576, 88 S.Ct.507 (1967); United States v Mendenhall, 446 US 544, 64 L.Ed.2d 497, 512, 100 S.Ct. 1870 (1980); Washington v Chrisman, 455 US 1, 70 L.Ed.2d 778, 787, 102 S.Ct. 812 (1982). The Fourth Amendment protects only against unreasonable intrusions into an individual's privacy. Chrisman, id. 70 L. Ed. 2d at 866. (Emphasis added). A search to which an individual consents satisfies this fourth amendment requirement. Zap v United States, 328 US 624, 90 L. Ed. 1477, 66 S. Ct. 1277 (1945); United States v Matlock, 415 US 164, 39 L. Ed. 2d 242, 246, 94 S. Ct. 988 (1974). These exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption. . . to show the need for it." Jones v United States, 357 US 493, 499, 2 L.Ed.2d 1514, 1519, 78 S.Ct. 1253.

The repetitive choice offered to plaintiff-appellee in Blackburn, supra., which was found to be in and of itself unconstitutional, quantitatively and qualitatively, is distinct from the choice given to the instant respondent, which was to submit to a single non-contact strip search, where there existed other corroborating circumstances, which as found by the district court, led petitioners to reasonably believe that she might be possessing contraband with the intent of passing the same to her inmate drug-addicted father.

Accordingly, in light of the fact that the totality of circumstances in the instant case materially differ from the totality of circumstances in Blackburn, supra., renders the same inapplicable as precedent to decide the merits of the instant case.

The district court applied the abundance of law that exists and that has been decided by this Honorable Supreme Court when addressing the constitutionality of searches upon those who consent, and waive their rights under the fourth amendment.

Accordingly, the district court properly found in the instant case, one's fourth amendment right in this respect may be waived, and was knowingly and intelligently waived by respondent. Zap, supra. As stated above, a search to which an individual consents meets the requirements of the fourth amendment. Katz, supra., 389 US at 586. Zap, id. 328 US at 628. To determine whether consent was voluntary, a court must look at the totality of the circumstances. Schneckloth v Bustamonte, 412 US 218, 93 S.Ct. 2041, 36 L.Ed.2d 854, 863 (1973). Thus the only question in the instant case, is whether respondent's waiver, by written consent, of her fourth amendment rights, was truly voluntary without undue coercion or duress, the burden being with petitioners. The district court went beyond that inquiry, by not only finding that under the totality of circumstances respondent's consent was voluntary

without being procured by coercion; that the search was totally reasonable in all respects, including but not limited to its scope; that respondent knew what a strip search entailed, and had a choice to either submit to the search, or leave the prison.

Such findings by the District Judge presiding, absent being clearly erroneous, may not be substituted by the Circuit Court, which did not preside over the testimony weighing its credibility and impact. Fed.R.Civ.P. 52(a); Inwood Laboratories, Inc. v Ives Laboratories, Inc., 456 US 844, 855-856, 72 L.Ed.2d 606, 102 S.Ct. 2182 (1982).

The impermissible impact and thrust of the First Circuit's opinion in the instant case mandates the conclusion that at no time, under any set of circumstances, irrespective of the quantum of suspicion, may prison officials procure "legally-cognizable" consent from an adult seeking to visit a prison inmate, by extending the choice to either undergo a strip search as a condition to said visit, or to leave the facility. This result constitutes an intolerable travesty to the most fundamental and enduring tenet of the United States Constitution, and totally strips prison officials of their authority to execute their duty to assure safety to those who are housed and employed therein, and to regulate their facilities as circumstances may warrant.

This flies in the face and totally abrogates this Supreme Court's establishment of the premise that prison administrators be accorded wider-ranging deference in the adoption and execution of policies and practices that in their judgment are critical to preserve internal order, security and discipline, and that this wisdom may not be superseded by the courts. Bell v Wolfish, 441 US 520, 547-48, 99 S.Ct. 1861, 1876, 60 L.Ed.2d 447 (1979).

Despite these doctrines as instituted by the Constitution and espoused by this Honorable Supreme Court, the First Circuit held that the mere posing of the choice is unconstitutional, while simultaneously acknowledging that prison visitors cannot credibly claim to carry the full panoply of rights normally enjoyed in a non-prison setting. It is incomprehensible how the First Circuit can extend a prison visitor more protection under the Constitution than one who enjoys a full spectrum of rights in non-prison contexts. It is well settled under the fourth and fourteenth amendments that a person arrested and searched in a criminal context can unequivocally provide a "legally-cognizable" consent thereto. Davis v United States, 328 US 582, 593-594, 90 L.Ed. 1453, 66 S. Ct. 1256; Zap, supra., 328 US 624, 630, 90 L.Ed. 1477, 66 S. Ct. 1277; Schneckloth, supra, 412 US 218, 36 L.Ed. 2d 854, 858, 93 S. Ct. 2041.

If the First Circuit's decision is permitted to stand, the respondent in this case walking the streets, in a non-prison context, if confronted by authorities with a request to undergo a search of her person, could provide a "legally-cognizable" consent thereto. Whereas this same respondent, entering

the prison to visit her inmate father, being presented with the choice of consenting to a search or leaving, would be endowed with superior constitutional protection, as the very presenting of the choice would render her voluntary, uncoerced written consent to the search, constitutionally intolerable and legally incognizable, rendering prison officials in each and every instance liable for damages resulting from said unlawful search and seizure.

CONCLUSION

Thus, petitioners urge that the holding of the First Circuit Court of Appeals in the case of Quattrocchi, Et Al v Cochrane, in and of itself is constitutionally intolerable, and is in conflict with applicable decisions of this Honorable Supreme Court, and accordingly, petitioners respectfully move that their petition for writ of certiorari be granted by this Honorable Supreme Court.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 91-1493

DAWN M. COCHRANE,
Plaintiff, Appellant
v.
WILLIAM QUATTROCCHI, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Ronald R. Lagueux, U.S. District Judge]

Before
Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

Vincent A. Indeglia with whom Law Offices of Vincent A. Indeglia and Edward J. Romano were on brief for appellant.
Michael B. Grant for appellees.

November 15, 1991

CYR, Circuit Judge. Appellant Dawn Cochrane brought an action for damages in the United States District Court for the District of Rhode Island asserting civil rights violations under 42 U.S.C. § 1983 and pendent state law claims for battery, intentional infliction of emotional distress, false imprisonment and assault, stemming from the strip search to which she was subjected before being permitted to visit her father in the Rhode Island Adult Corrections Institute ["ACI"]. The district court directed verdicts in favor of all defendant-appellees at the conclusion of appellant's case in chief. We vacate the district court judgment and remand for a new trial.

I

FACTS

Viewing the evidence and all fair inferences in the light most favorable to the nonmoving party, the jury could have found the following facts.[1] Appellant, the teenage daughter of ACI inmate Rickie A. Cochrane ("Cochrane"), has been a regular visitor at ACI since she was very young. She has never violated a prison visitation rule or presented any threat to institutional security. Cochrane, one the other hand, has spent most of his adult life in prison and admits to having used contraband drugs on ten to twenty occasions while incarcerated.

On arrival at ACI on June 10, 1989, appellant was informed that she would not be allowed to visit her father that day, or ever again, until she submitted to a strip search. Appellant was presented with a form containing a consent to search, which she signed. Two female correctional officers then

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[1]On a motion for directed verdict under Federal Rule of Civil Procedure 50(a), the trial court must view the evidence, and draw all fair inferences, in the light most favorable to the party against whom the motion for directed verdict is made. See Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 656 n.6 (1st Cir.), cert. denied, 368 U.S. 931 (1961). See generally 5A Moore's Federal Practice ¶ 50.02 [1] n.20 (2d ed. 1966). We in turn are required to view the evidence in the same favorable light and to accord the nonmovant "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). See also Roche v. New Hampshire Nat'l Bank, 192 F.2d 203, 205 (1st Cir. 1951). See generally 5A Moore's ¶ 50.02 [1] n.21.

led her into a bathroom, where they told her to remove her clothing. A correctional officer checked her hair and her ears. Appellant as instructed to squat, hold her head to her chest and cough, while two correction officers stood behind her. No contraband was discovered and appellant was permitted to visit her father. Appellant was emotionally shaken by the experience.

During October 1988, inmate Cochrane had been found unconscious in his cell following an overdose of cocaine, which Cochrane told a police officer was supplied by appellee Deputy Quattrocchi or his son, a correctional officer at ACI. Upon learning that Cochrane had mentioned him and his son, appellee Quattrocchi became angry and warned Cochrane, "I'm going to get you for that."

The district court first ruled that appellant had no constitutional right to visit her father in prison. The court then concluded that there could be no fourth amendment violation, since appellant had consented to the strip search and the search was reasonable in scope. The court directed the challenged verdicts before the defendants presented their case.

II

DISCUSSION

Like every other circuit that has considered the question, see Thorne v. Jones, 765 F.2d 1270, 1276 (5th Cir. 1985); Daugherty v. Campbell, 935 F.2d 780, 787 (6th Cir. 1991); Smothers v. Gibson, 778 F.2d 470, 473 (8th Cir. 1985), we have held that a prison visitor retains a fourth amendment right to be free from unreasonable searches and seizures, Blackburn v. Snow, 771 F.2d 556, 563 (1st Cir. 1985). Reasonableness, of course, " 'depends on the context within which a search takes place.' " Id. at 563 (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)). "[I]n deciding to what standard of reasonableness prison officials strip searching visitors should be held, we must balance the official interest in maintaining security against the intrusion entailed by a strip search[,]" id. at 564, bearing in mind both that "the preservation of internal security ' is "central to all other corrections goals," ' " id. at 562 (quoting Hudson v. Palmer, 468 U.S. 517, 528 (1984) (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974))), and that prison visitors possess a "diminished expectation of privacy," id. at 564; see also id. at 563 ("Those visiting a prison cannot credibly claim to carry with them the full panoply of rights they normally enjoy").

On the other hand, we recognize that a "strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual...." Burns v. Loranger, 907 F.2d 233, 235 n.6

(1st Cir. 1990); see also Arruda v. Fair, 710 F.2d 886, 887 (1st Cir 1983) (recognizing the "severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities"); Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) ("a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience"). These latter considerations have prompted us to hold that some as-yet undefined "level of individualized suspicion" is necessary before a strip search of a prison visitor can be reconciled with the requirements of the fourth amendment. Blackburn, 771 F.2d at 567 (emphasis added).[2]

Appellees contend that the strip search was reasonable, as it was based both on information from a reliable informant and of the uncontroverted evidence of Cochrane's repeated drug use while incarcerated. The view we are required to take of the evidence, see supra note 1, precludes either contention on the present record. See also De Leon Lopez v. Corporacion Insular De Seguros, 931 F.2d 116, 123 (1st Cir. 1991) (court must " 'examine the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to the nonmovant' in order to see if 'reasonable persons could reach but one conclusion' ") (quoting Wagenmann v. Adams, 829 F.2d 196, 200 (1st Cir. 1987)).

Appellant argues that two factors undermine the validity of the strip search: (1) it was done in retaliation for Cochrane's allegations against appellee Quattrocchi (2) there was insufficient indicia of reliability surrounding the evidence that appellant had, in the past, brought drugs into the correctional facility. On this record we conclude that a reasonable person, crediting Cochrane's testimony, as we are presently required to do, could have found that the strip search was conducted in retaliation for Cochrane's allegations - whether made seriously or sardonically -[3] that Quattrocchi or his son supplied the cocaine used by Cochrane in October, 1988. Moreover, absent any evidence that appellant ever violated a prison visitation rule, or ever supplied Cochrane with drugs, a reasonable juror could have concluded that Cochrane's contraband drugs were supplied by prison officials or other inmates. Thus, the

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[2]Appellees neither assert, nor have they yet evidenced, "highly unusual circumstances" such as might remove the case from the holding in Blackburn. See Blackburn, 771 F.2d at 567.

[3]The record suggests that Cochrane's allegation regarding Quattrocchi's role in his cocaine overdose may have been flippant, a sarcastic response to a police officer's "insult[ing]" suggestion that Cochrane was "going to tell him anything."

jury could have found that the strip search of appellant was unreasonable because it was based on no "individualized suspicion." Blackburn, 771 F.2d at 567; see also Hunter, 672 F.2d at 675 ("reasonable suspicion standard...requires individualized suspicion, specifically directed to the person who is targeted for the strip search"); Thorne, 765 F.2d at 1277 ("'"reasonable suspicion" must be specifically directed to the person to be searched'" (quoting United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir. 1978)).

Our conclusion finds further support in Quattrocchi's testimony as to the reliability of his confidential informant. On direct examination, Quattrocchi admitted that until the morning of the trial, he had been unable to remember the name of the informant who told him that Dawn Cochrane had been carrying drugs to her father. Thereafter, he vouched for the reliability of the informant in only the most general terms, stating in formulaic fashion that the inmate was "a reliable informant, who had proved reliable in the past."

Only much later, ironically on cross-examination by appellant's lawyer, was there any approach to specificity. Even then, the indicia of reliability were meager. Quattrocchi was unable to recall the date when he began to use the informant, and was unwilling to specify the time period during which the information was supplied, or to describe the information received in any detail, stating only that "whenever [the informant] did give me information, it was reliable." With considerable prodding by appellant's counsel, Quattrocchi eventually testified that the informant had, over roughly a six month period, provided reliable information regarding the introduction of narcotics and weapons into the correctional facility.

While this evidence, standing alone, might be viewed as sufficient to justify the strip search of appellant, it is fragile enough to be overcome by a finding that a retaliatory motive, rather than "individualized suspicion," was the real basis for the search.

Since it is the province of the jury to judge witness credibility, see, e.g., United States v. Seeley, 892 F.2d 1, 4 (1st Cir. 1989), and it is for the jury to determine the reasonableness of a search in a section 1983 action, Keeler v. Hewitt, 697 F.2d 8, 12 (1st Cir. 1982) ("the 'reasonableness' of the defendants' conduct was a question of fact for the jury to determine from the totality of a number of specific and, in many instances, disputed facts"), the motion for directed verdict submitted at the conclusion of appellant's case in chief should have been denied.

The district court ruling that appellant's execution of the consent form mooted any question as to whether there was a reasonable basis for the strip search runs counter to our decision in Blackburn, supra. There we considered whether a prison visitor who had provided written consents to successive strip

searches had waived any fourth amendment claim.[4] The Blackburn panel decided, as a matter of law, Blackburn, 771 F.2d at 567, that a prison visitor confronted with the choice between submitting to a strip search or foregoing a visit cannot provide a "legally cognizable consent," id. at 569. Pretermitting the question whether a visitor possessed a constitutional right, or merely a privilege, to visit the prison, Blackburn concluded that conditioning "access to the Jail upon sacrifice of [the visitor's] right to be free of an otherwise unreasonable strip search" was "dispositive of the consent issue." Id. at 568. Blackburn rejected the argument that the visitor's right to leave rather than submit to search, or to decline to return after the first strip search, in any way affected the issue; "for it is the very choice to which she was put that is constitutionally intolerable...." id. (emphasis in original); see also Thorne, 765 F.2d at 1276 (consent does not render a groundless strip search reasonable); Daugherty, 935 F.2d 780 (same). Given that appellant in the instant case was confronted with a similar, and no less "constitutionally intolerable," choice between being denied prison visitation access indefinitely or waiving her constitutional right to be free from unreasonable search, Blackburn requires the conclusion that appellant gave no "legally cognizable consent." The directed verdicts must be vacated.

The district court judgment is vacated and the case is remanded for a new trial. Costs are awarded to appellant.

[4]Unlike the present case, Blackburn involved a uniform jail policy requiring strip searches of all visitors. Blackburn, 771 F.2d at 559.

APPENDIX B

submit to a strip-search and visit, or she could refuse to submit to a strip-search and not visit. She was clearly given that choice. She opted to subject herself to a strip-search, so that there is no issue of any deprivation of any constitutional right in that part of the case.

MR. INDEGLIA: Your Honor, I don't mean to anger the Court or argue with the Court. All I'm saying is they have a policy there, "We can search." Obviously, it's a privilege to visit somebody. But what she's saying is, "I wasn't even given that choice." I think she just testified that, "I wasn't given that choice. I was told to submit to the search." She didn't see that as a choice.

THE COURT: That isn't her testimony at all.

MR. INDEGLIA: Furthermore -

THE COURT: She clarified it when I asked her the question. She tried to give that impression, but clearly, she knew she had a choice.

MR. INDEGLIA: Well, additionally, if I may proceed, whether she did or not, there is nothing in the evidence to say what this form of visitor consent says. There is not a form in evidence. There is nothing showing her signature that she signed. She testified she signed something, but we don't know what that is. I haven't put anything into evidence. The defendant -

THE COURT: There is evidence that she consented to this strip-search, and she knew what a strip-search was, in order to see her father, in order to visit her father. This was a choice she made. Clearly, she was between a rock and a hard place, but people are between those two spots often, and they have to make a decision.

MR. INDEGLIA: Well, your Honor, I would suggest when you're placed between a rock and a hard place, that amounts to duress, or possibly to fraud.

THE COURT: Not at all. We meet rocks and hard places every day in our lives, and we have to make choices, and sometimes they're very difficult, economic choices. There is no constitutional right implicated in that phase of the case. She has no right to visit her father, and she was given a choice.

MR. INDEGLIA: There may be no constitutional right, per se, to visit her father -

THE COURT: Well, you're -

MR. INDEGLIA: I'm sorry, I don't mean to argue.

THE COURT: You're bringing a 1983 cause of action. You're claiming some deprivation of a constitutional right by this plaintiff. What is it?

MR. INDEGLIA: Isn't she entitled to a right to freedom of association, and when the state grants her that privilege, the state can't usurp that privilege without some cause for taking that privilege away.

THE COURT: She has no right to go to the ACI to visit anyone.

MR. INDEGLIA: Well, they gave her that right. The state gave her that right.

THE COURT: They gave her a choice. They gave her a choice.

MR. INDEGLIA: First they gave her the right to see him, and then they told her strip or don't see your father.

THE COURT: It's a privilege.

MR. INDEGLIA: But they gave that privilege. You can't simply usurp a privilege without some basis for usurping it.

THE COURT: They can take it away anytime, for any reason. What is there in the law that says that a person has a right to go visit at the ACI, in the Constitution of the United States?

MR. INDEGLIA: Your Honor, I suggest that the case of Cole v Snow, 586 F. Supp. 655, District Court of Massachusetts, 1984, provides in the case law some freedom of association with regard to visits, and I suggest that that case permits some type of freedom of association in visits. I further suggest that Thompson v Commonwealth of Kentucky, Department of Corporations, 833 F.2d 614, Sixth Circuit, 1987. Both of those cases address First Amendment rights, and both times the Court comes down and finds that the visitor, once given that privilege, has a constitutional right to freely associate, unless there is some cause that is detrimental to the safety of the prison, the inmates, the visitors, at which time they can do whatever investigation they need to, and what I'm saying here, it's the same thing. She had a right to go in and see her father because they granted her that privilege. They'd never taken that privilege away from her in the entire 17 years of being there. She shows up, they say, "Sign this form, you can't see your father ever again," and to say that there's a free choice, believe me, I have all due respect for this Court, I just simply disagree. I don't see that as a right of free choice that I can go away or not go away, and I know the Court inquired into it on its own as to that issue. I just don't see that as a free choice. It may be a rock and a hard place, and everybody has to make hard choices, but for her to be denied and be told, "I can never see my father again, my father may be serving 45 years in prison, he's 39 years old, I can never see him again," of course she's going to submit to a strip-search. Of course she's going to do that.

THE COURT: The evidence here is that he's serving four years.

MR. INDEGLIA: Well, he's now serving four years. The evidence is at 1989, there were pending federal gun charges for which if he was found convicted, carried a maximum sentence of 45 years.

THE COURT: But he was serving four years. As far as we know, that's all he's serving. You haven't proven anything else. You proved that there was an indictment.

MR. INDEGLIA: There was that potential, your Honor.

THE COURT: So what? Ergo quid, so what? She had a choice to submit to a strip-search and see her father, or not submit to a strip-search and not see her father. That was her choice, and she elected to submit to a strip-search knowing what it was, that she was going to be stripped of her clothes.

MR. INDEGLIA: Your Honor, her testimony is that these people were authority figures. It's not her position to disagree with an authority figure. She's an 18 year old girl. She's only 18 years old.

THE COURT: She's an adult that's given a choice.

MR. INDEGLIA: She's still in high school, your Honor. I think there's enough that the jury can answer that question, and if that's what the Court's decision is, I'm not going to further belabor the point. I would ask for an exception to the ruling, that's all. I don't see that we have to go any further. I mean, if the decision is going to be based on the consent decision, you're absolutely correct, we don't even get to the other issues of probable cause or anything else in the case.

THE COURT: That's right. The question of probable cause is a red herring in this case, and absolute red herring. I told you that before.

MR. INDEGLIA: I'm not going to argue that point on it, your Honor. All I'm saying is that I feel there was duress here, some type of fraud by omission of facts by the lieutenant. The lieutenant admitted that he omitted making those statements to her, that she had the option and she could present herself back to the board of review, whatever those options were. She wasn't told about that. It was her testimony it was her understanding that was the situation. I suggest there is a First Amendment right of freedom of association. Once the state grants that privilege, they can't just simply usurp it. And that's my argument in summation, your Honor.

THE COURT: All right.

MR. INDEGLIA: Thank you.

THE COURT: In deciding a motion for a directed verdict, I have to view the evidence in the light most favorable to the plaintiff and draw all reasonable inference in favor of the plaintiff. Viewing the evidence in that light here, it appears that on June 10, 1989, the plaintiff went to the high security unit of the Adult Correctional Institutions, otherwise known as Supermax, to visit her father. She'd been granted visiting privileges to go alone as a minor, since she was the age of 16. Now she was an adult at the age of 18 and was proposing to see her father, with her grandmother. She was advised that in order to see her father, that day, or ever, in the ACI, I'll assume

those are the facts, she had to submit to a strip-search. She was given the choice. She elected to submit to a strip search. She stated that, and she stated she did it because she wanted to see her father. That was a choice she made.

I am satisfied there is no constitutional right to visit inmates at any penal institution, despite what some other courts may have said. She had no constitutional right to go into those premises to visit her father, and therefore, the choice that she was given is not implicated by any questions of probable cause or any such matters. Whether Associate Director Quattrocchi had probable cause to believe that she was bringing in contraband or not, is of no consequence. The fact of the matter is he made a decision based on a number of factors that he was going to require that she submit to a strip-search in order to visit her father that day. She chose to submit to a strip-search. There is no constitutional right implicated. Viewing the evidence in the light most favorable to the plaintiff, she has not been deprived of a constitutional right by being given that choice. She voluntarily elected to submit to a strip-search, and by her own testimony, she knew what a strip-search was, that her clothes would be taken off, and that her clothes, at least, would be examined. She, obviously, also had to know that since her clothes were being taken off, that her body would be looked at, also.

In any event, the issuance of that order by defendant Quattrocchi does not implicate any constitutional rights of the plaintiff. This is an action brought under 1983, and she has to prove that she was deprived of a constitutional right.

The next phase of the case, is whether or not the strip-search as carried out was reasonable. A constitutional right is implicated there. Even though she consented to a strip-search, the fact of the matter is the strip-search must be reasonable. If it is unreasonably conducted, if there is an unreasonable intrusion, then there is a violation of the United States Constitution, and liability may be imposed. In this case, viewing the evidence in the light most favorable to the plaintiff, based on her own testimony, this strip-search was reasonably conducted in all respects. She was not touched in any way, except if I accept her testimony she was touched near the ear when someone looked behind it, or her hair was touched to determine if there was anything in it. There was no intrusion into any orifices of her body, and she was not touched in any area other than what she indicated.

Therefore, as a matter of law, that was a reasonable strip-search under the circumstances, and there's been no violation of any constitutional rights.

Therefore, based on the evidence viewed in the light most favorable to the plaintiff, the plaintiff cannot recover under either theory that's been asserted in this case, and therefore, the Court directs a verdict for each of the three remaining named defendants. The Clerk will enter judgment for those defendants.

MR. INDEGLIA: Thank you, your Honor.
MR. GRANT: Thank you, your Honor.
THE COURT: Bring in the jury so I may discharge them.

(Jury discharged)